

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs May 6, 2009

**IN RE T.M.H.**

**Appeal from the Chancery Court for Bedford County  
No. 296 James B. Cox, Chancellor**

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**No. M2008-02427-COA-R3-PT - Filed June 29, 2009**

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The trial court terminated the parental rights of the father of a five year old boy on the grounds of abandonment and on a finding that the father had shown wanton disregard for the child's welfare and had committed severe child abuse. We affirm the termination because abandonment by pre-incarceration conduct demonstrating wanton disregard for the child's welfare was proved by clear and convincing evidence, and because clear and convincing evidence established that termination of the father's parental rights was in the child's best interest.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Robert Samuel Peters, Winchester, Tennessee, for the appellant, J.W.

R.H., T.H., No appellees' brief filed.

**OPINION**

The child at the center of this controversy, T.M.H., was born on June 26, 2003. His biological father, J. W. ("Father"), is currently in prison after a conviction for aggravated assault against a former girlfriend. The proof shows that Father did not provide or offer to provide any support to T.M.H. prior to his incarceration and that he inflicted a savage beating on T.M.H.'s mother, T.H. ("Mother"), when she was five or six months pregnant with him.

T.M.H. was the third child born to Mother, who had two other children from an earlier marriage to R.H., a petitioner in this case. After Mother and R.H. divorced, Mother began a relationship with Father. According to Mother's testimony, Father was all right at first, but then he started drinking, and as the drinking increased, "He would get angry over little things and there would be a lot of arguing, and he kept threatening me if I left, I would have consequences to suffer."

Mother's increasing problems with Father coincided with her discovery that she was pregnant. Despite his threats, Mother left Father's home and moved into her own mother's house. On February 24, 2003, Father kicked in the door of that house, went to the back bedroom, flipped over the mattress on which Mother was lying down, throwing her onto the floor, and began hitting her, pulling her hair, and kicking her with steel-toe boots.

According to Mother's testimony, as Father was beating her "[h]e was just screaming and screaming. He was foaming from the mouth. He kept telling me he was going to kill me, he was going to kill my kids, he was going to kill my mom." She testified that she tried to protect her stomach by curling up into a ball. Father admitted that he hit and kicked Mother and pulled her hair, but denied that any of his blows landed on her belly.

The attack was stopped by a knock on the door by Officer Troy Clark of the Winchester Police Department. He was responding to a request by R.H., who knew about earlier incidents of violence between Father and Mother and was worried about the welfare of his former wife. According to Officer Clark's testimony, Father came to the door. The officer asked to speak to Mother, and Father responded, "I'll be right back."

After a while, Mother finally made it to the door. She appeared dazed and was unresponsive to Officer Clark's questions. Officer Clark opened the door and could see that the frame had been splintered. Household items were strewn all over the floor. The officer looked through the house and saw that Father had left.

Officer Clark placed Mother in his patrol car and took her to the police department. Once there, he observed bruises and cuts about her face, arms and legs. She still seemed dazed. She was brought by ambulance to the emergency room of Southern Tennessee Medical Center in Winchester. R.H. accompanied Mother in the ambulance. The medical records show that she was diagnosed with a concussion. The doctors also performed stress tests to make sure that the baby was all right.

After Mother was discharged from the hospital, R.H. resumed his relationship with her and took a supporting role as her pregnancy progressed. She moved back in with him in April or May of 2003. As we noted above, T.M.H. was born on June 26, 2003. He was a healthy child and had apparently not suffered any damage as a result of the beating by Father. R.H. was present at the delivery, and his name was entered into the birth certificate as the child's father. Father testified that he was at the hospital on the day T.M.H. was born, but wasn't allowed to see him. R.H. and Mother remarried on October 28, 2004.

In July or August of 2003, Father asked for a paternity test, which was performed sometime in August. On September 11, 2003, the test results were completed, showing a 99.99% probability that Father was T.M.H.'s biological father. Father testified that he was not informed of the test results until the middle or end of October, but that on the day following their disclosure, he went to his lawyer and asked her to file an action to establish his paternity.

The next significant event for Father occurred on January 3, 2004. On that date, he severely injured a woman named Carol Turner, who was his girlfriend at the time, by pushing her out of a pickup truck and running her over. He claimed that it was an accident, but he pled guilty to aggravated assault and two other counts arising from his actions on that day, and he was sentenced to nine years in prison. An account of the events of January 3, 2004, can be found in an opinion filed by this court, *Turner v. City of Winchester et al.*, No. M2008-00401-COA-R3-CV, 2009 WL 1037942 (Tenn. Ct. App. April 17, 2009). It appears from the record that Father was jailed on the charges in January of 2004.

Father's paternity action progressed, for the record contains a certified copy of a document filed by the Circuit Court of Franklin County, titled "Findings and Recommendations and Order of Parentage and Support." The document recites that a hearing was conducted before the child support referee on August 28, 2004, resulting in a declaration that Father was the biological father of T.M.H. Questions of retroactive and current child support were reserved for a later proceeding.

### **I. TERMINATION PROCEEDINGS**

On July 21, 2005 Mother<sup>1</sup> and R.H. filed a petition in the Chancery Court of Bedford County asking that Father's parental rights be terminated and that R.H. be allowed to adopt T.M.H. The grounds for termination alleged in the petition were that Father abandoned T.M.H. by failing to support him "throughout his life and prior to this birth." Also, that he committed severe child abuse and showed wanton disregard for the welfare of the child.

The petition was served on Father at Whiteville Correctional Facility. He responded with a hand-written *pro se* answer in which he declared that he did not agree with the proposed adoption, noted that he himself had initiated the paternity test, and that "[a]fter my release from this facility I would love a chance to develop a relationship with my son." He also asked the court to appoint an attorney for him.

An attorney was appointed for Father, who then filed a more substantive answer. The trial court also appointed a guardian *ad litem* to protect the interests of the child, and a date was set for trial. Unfortunately, the guardian *ad litem* was unable to serve, and a new guardian had to be appointed. The trial was finally conducted on August 21, 2008. By that time, T.M.H. was five years old. Father was transported from prison to appear in court, and he testified at length. Mother also testified, as did her mother and her grandmother, R.H., Officer Clark, and Father's two adult stepdaughters.

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<sup>1</sup>Tenn. Code Ann. § 36-1-113(b) sets out an exclusive list of persons or entities that have standing to file a petition to terminate the parental rights or guardianship rights "of a person alleged to be a parent or guardian of such child." The list includes the prospective adoptive parent of the child, but it does not include the other biological parent. Thus, R.H. has standing to bring this petition, but Mother does not. See *In the Matter of M.L.P.*, 281 S.W.3d 387, 391-92 (Tenn. 2009).

As we indicated above, Mother testified in detail about the beating Father inflicted on her. She also testified that Father saw T.M.H. twice after his birth. The first time was during an accidental meeting in a Wal-Mart when the child was between one month and six weeks old. A second meeting occurred when Father's two stepdaughters were visiting Mother, and he called them on cell phone to ask them to request that Mother bring the child outside for him to see. She did so, and he was able to observe the child from behind the driver's seat of his pickup truck.

Mother was asked about any phone calls or communications she received from Father. Mother answered that before the paternity test was completed, Father's calls all involved threats to do away with her and T.M.H. "and the rest of us." After the paternity tests were completed, he called several times, "but all the times that he called it was just threats of coming to kidnap [T.M.H.]. Take [T.M.H.]. Begging me to come back to him. Otherwise he was going to kill us." R.H. overheard some of the phone calls and confirmed Mother's account. Mother's mother and her grandmother also testified as to such threats by Father.

R.H. testified that in course of their two marriages to each other, he and Mother had been together for a total of ten years. He stated that he had a strong relationship with T.M.H., had been with the child from the beginning, had provided financial support for him throughout his life and that T.M.H. considered him "the only father he knows." He also declared that he loved T.M.H. very much and wanted to adopt him as his son. Asked to further describe their relationship, he stated, "he calls me Daddy. We do play ball and ride bicycles, go fishing, watch airplanes fly. I've changed plenty of diapers when he was little. Watch movies all the time. Do all kinds of things together."

Mother's mother testified that R.H. and T.M.H. had a good father/son relationship and that T.M.H. looks up to R.H. and always tries to imitate him: "He wants to wear cowboy boots to school and can't. Because his daddy wears them, why can't he wear them to school? Little things like that." Mother's grandmother testified that R.H. always made sure that T.M.H. had what he needed, whether food, clothing or medication. She stated that he was always there for the child, and that he treated him no differently from his other children.

When Father took the stand, he admitted that he knew Mother was pregnant when he beat her, but attempted to minimize the severity of the beating. Under questioning, he denied punching her ("I smacked her"), said he didn't remember kicking her, admitted flipping the mattress, pulling her hair and smacking her on the side of her head. He also claimed that "I didn't do nothing around her stomach. I did not try in any way to hurt the child at all." He denied that he threatened to kill her and the baby.

Father did express some understanding of the seriousness of his actions. In response to a question, he replied, "[a]t the time I was mad, you know. You do things you regret. I'm sorry." Follow-up questions elicited the reply, "[i]t wasn't a good thing. I regret it. It was a bad thing to do," and "[t]hat's a dangerous thing to do. I shouldn't have done it. I know that." He also testified that he has taken some anger management classes while in prison.

Father is a concrete worker who had operated his own business. He was asked about his earnings between June of 2003 and January of 2004, and he stated that it depended on the time of year, the weather and the job. He estimated that in the summer months “I made probably anywhere from 300 to 600 per week. The winter months got worse. Sometimes I didn’t make nothing.” He admitted that he never offered any support for T.M.H., but testified that his lawyer “told me basically just to stay away until we get to court to deal with child support.” He was asked if he believed in July of 2003 that T.M.H. was his child and if that was why he began the paternity action. He responded, “I had some idea, I wasn’t sure.”

Father also testified that after his paternity was confirmed and before he went to prison, he talked to Mother on the phone “almost every night” and she told him what was going on with T.M.H., but that she refused to let him see the child. He also stated that he had two photo albums full of pictures of T.M.H. that his daughters had sent him, and he declared “I just want to have a regular father/son relationship, you know. I love that little boy.”

After Father’s testimony the defense called Father’s two grown stepdaughters. They both testified that he had been a loving and supportive father to them and that they still considered him their father, even though he and their mother were not longer together. They further testified that the separation between Father and their mother was accomplished without threats or violence. Both sisters also testified that they had maintained a good relationship with Mother, and that Father was always eager to hear news of T.M.H. whenever they visited him in prison or spoke to him on the phone.

Both women stoutly defended Father in the face of aggressive questioning about his violent conduct towards Mother, answering several questions by saying that “parents make mistakes,” and “accidents do happen and people make mistakes.” They also suggested that Mother’s injuries were not as bad as she made them out to be, and one observed that “[Officer Clark] just said she had a couple of scrapes and bruises. Women get beat up every day.”

The guardian *ad litem* announced that she would only address the question of the best interest of the child, which she declared would be served by the termination of Father’s rights. Among other things, she noted that the only father T.M.H. knew was R.H., and that “[t]o allow [Father] to come into this child’s life would be like swinging a wrecking ball through the child’s life emotionally.”

The trial court’s final order, dated September 23, 2008, included findings of facts and conclusions of law. The court summarized the trial testimony in detail, and declared that Mother’s account of the attack on her “is the correct one,” while Father’s account is “almost laughable” and that he “has absolutely no credibility.”

The trial court found that the grounds of abandonment, severe child abuse and wanton disregard for the welfare of the child had been proved by clear and convincing evidence. The court also found clear and convincing evidence that it was in the best interest of T.M.H. for Father’s

parental rights to be terminated. The court accordingly granted the petition for termination. This appeal followed.

## II. TERMINATION OF PARENTAL RIGHTS

The standard for termination of a parent's rights has been set out many times. Most recently, the Tennessee Supreme Court explained:

A party seeking termination of parental rights must prove two elements by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c). First, the party must prove one of the statutory grounds for termination enumerated in Tennessee Code Annotated section 36-1-113(g). *Id.*; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). Second, the party must show that termination is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

*In the Matter of M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009).

Our legislature has identified those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth specific grounds on which termination proceedings can be brought. Tenn. Code Ann. § 36-1-113(g). The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborne v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garret*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W. 2d 620, 622 (Tenn. Ct. App. 1998). Only one statutory ground need be proved to support the termination of parental rights, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Georgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006).

When we review a trial court's decision to terminate parental rights, we must first review the trial court's specific findings of fact in accordance with Tenn. R. App. P. 13(d). Under that standard, each of the court's specific findings of fact is presumed to be correct, unless the evidence preponderates otherwise. Second, we must review the trial court's conclusions of law *de novo*, without according any presumption of correctness to its conclusions as to whether the facts as determined by the trial court or supported by the preponderance of the evidence clearly and

convincingly establish the elements required to terminate a biological parent's parental rights . *In re Giorgianna H.*, 205 S.W.3d at 516. As the Tennessee Supreme Court has recently explained:

We review the trial court's findings of fact de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re A.M.H.*, 215 S.W.3d at 809. In lieu of specific findings of fact concerning the issue of abandonment, the juvenile court concluded that Father did not abandon M.L.P. because Great Aunt frustrated Father's attempts to visit M.L.P. We review "the trial court's ruling that the facts of [a] case sufficiently support the termination ground of willful abandonment," a conclusion of law, de novo with no presumption of correctness. *Id.* at 810.

*In the Matter of M.L.P.*, 281 S.W.3d at 393.

Since the appellees did not file a brief in this case, we must decide the appeal on the record and the appellant's brief alone. Tenn. R. App. P. 29(c).

### III. WANTON DISREGARD

The petition alleges, among other grounds, that Father had "displayed a wanton disregard for the welfare of [T.M.H.]," citing Tenn. Code Ann. § 36-1-113. The "wanton disregard" language actually appears in Tenn. Code Ann. § 36-1-102(1)(A)(iv) as one of the alternative definitions of abandonment as a ground for termination of parental rights. *See* Tenn. Code Ann. § 36-1-113(g)(1) (incorporating the definitions of abandonment found in Tenn. Code Ann. § 36-1-102 as a ground for termination). The statutory provision applies to a parent who was incarcerated during all or part of the four months immediately preceding the filing of the petition to terminate that parent's rights and who "has engaged in conduct prior to incarceration that exhibits wanton disregard for the welfare of the child." Tenn. Code Ann. § 36-1-102(1)(A)(iv).

Examples of wanton disregard might include conduct such as "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child." *In re Audrey S.*, 182 S.W.3d 838, 867-68 (Tenn. Ct. App. 2005). In this case, the trial court found that Father "clearly entered a habitation without permission for the sole purpose of perpetrating an assault on the mother, which he accomplished with such violence and viciousness that the mother was carried to a hospital to be checked out. This attack was clearly perpetrated on the mother with a wanton disregard for her safety and the safety of the unborn child." The court also found that after T.M.H. was born, Father "initiated a course of conduct that caused bodily injury to another, to which he pled guilty to a nine (9) year sentence and his incarceration."<sup>2</sup>

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<sup>2</sup> We note that an additional ground for termination of parental rights can be found at Tenn. Code Ann. § 36-1-113 (g)(6): "The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court." The court mentioned this ground, but correctly ruled that it was inapplicable to

(continued...)

The ground of wanton disregard does not require that the conduct referred to occur within the four month window prior to incarceration. *In re Audrey S.*, 182 S.W.3d at 865 (“This test has no analog to the first statutory definition of abandonment, and it is not expressly limited to any particular four-month period.”). *See also State Dept. of Children’s Services v. V.N. et al.*, 279 S.W.3d 306, 320 (Tenn. Ct. App. 2008) (wanton disregard shown by fact that defendant had been incarcerated nineteen previous times). Further, the conduct may occur before the birth of the child whose welfare is thereby put at risk. *State Dept. of Children’s Services v. Harville*, No. E2008-00475-COA-R3-PT, 2009 WL 961782 at \*8 (Tenn. Ct. App. April 9, 2009) (mother’s ingestion of cocaine during pregnancy showed wanton disregard for the welfare of the child *in utero* and supported termination of the mother’s parental rights on that ground).

There can be no doubt that a violent physical attack on the mother of an unborn child amounts to wanton disregard for that child’s welfare for several reasons (danger to the child and danger to the mother) and may support the termination of the attacker’s parental rights. Additionally, Father’s assault on his former girlfriend resulted in his incarceration for nine years. We accordingly affirm the trial court’s finding of abandonment by conduct demonstrating wanton disregard of the child’s welfare in this case.

#### **IV. THE BEST INTEREST OF THE CHILD**

Once a ground for termination is proved by clear and convincing evidence, the next inquiry for the trial court is whether termination of a parent’s rights is in the best interest of the child, which also must be proved by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(2).

Another section of that statute sets out a list of non-exclusive factors for the court to consider in making its determination of best interest:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

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<sup>2</sup>(...continued)

this case because Father’s sentence was only nine years.



- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

Even the most cursory review of these factors would show that almost all of them weigh heavily in favor of termination. Father has not made it safe for T.M.H. to be in his presence; he has not maintained visitation or contact with the child; he has not paid child support; he has no meaningful relationship with the child; he suffers from uncontrollable anger, which has resulted more than once in violence and brutal abuse against people close to him. Further, the proof showed that R.H. is a supportive and loving father, and the only father T.M.H. has ever known, and several witnesses testified that the introduction of Father into his life would have a devastating impact on him. We therefore must conclude that the trial court correctly found clear and convincing evidence that termination of Father's parental rights was in T.M.H.'s best interest.

## **VII.**

The order of the trial court is affirmed. We remand this case to the Chancery Court of Bedford County for any further proceedings necessary. Tax the costs on appeal to the appellant, J.W.

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PATRICIA J. COTTRELL, P.J., M.S.